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No. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

On Appeal from the Supreme Court of Ohio

THE YOUNGSTOWN SHEET AND TUBE COMPANY,
Appellant,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,
Appellee.

BRIEF FOR APPELLANT

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INDEX

Opinions below 1
Jurisdiction 1
Questions presented 2
Constitutional provisions and statutes involved 2
Statement 3
Summary of argument 6
Imports 6
Equal protection 8
Argument 10
I. Imports 10
A. Imported bulk fungibles do not lose the immunity granted them under Article I, Section 10, Clause 2 of the Constitution of the United States so long as they are held by the importer in storage and not used for the manufacturing purpose for which they were imported 10
B. The rule established in Brown vs. Maryland, supra, has also found expression in various state courts' decisions and derives support from them 16
C. The decision of the Supreme Court of Ohio makes an unwarranted distinction between bulk fungible and packaged imports 22
D. The tax consequences for imported merchandise are determined as of tax day 24
E. The purpose of the imports clause was to confer the control of imports exclusively upon the Federal Government as distinguished from the various states and territories 26
F. Conclusion 28

II. Equal protection 29
A. Former Section 5701.08, Revised Code of Ohio, denies the appellant the equal protection of the laws for the reason that it imposes a tax upon the storage merchandise of domestic corporations held for storage only, while at the same time excepting from taxation the storage merchandise of non-residents when similarly held for storage only 29
B. Former Section 5701.08, Revised Code of Ohio, denies the appellant the equal protection of the laws for the reason that it discriminates against taxpayers engaged in the same business and holding the same kind of property for storage only 35
C. The entire exception cannot be removed from the statute 37
D. Section 5701.08, Revised Code of Ohio is unconstitutional to the extent that it results in the imposition of a tax upon personal property held by residents for storage only 41
Conclusion 42
Appendix I—Statutes 43
Appendix II—Opinion of the New Jersey Supreme Court in the case of Mexican Petroleum Corp. v. Borough of Roosevelt, et al 45

Cases Cited

Allied Stores of Ohio, Inc. v. Bowers, 166 O. S. 116, 140 N. E. 2d 411 37
American Steel & Wire Co. v. Speed, 195 U. S. 500..... 12
Brown v. Maryland, 12 Wheat., 419..10, 11, 16, 22, 24, 26
Case of The State Freight Tax, 15 Wall. 232 27
City of Galveston v. Mexican Petroleum Corp., 15 F. 2d, 208 18

Coe v. Errol, 116 U. S. 517 25
Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 565 40
East Ohio Gas Co. v. Tax Commission of Ohio, et al., 283 U. S. 465 13
Frost v. Commission of Oklahoma, 278 U. S. 515 39
General Cigar Co., Inc. v. Peck, 159 Ohio St. 152, 111 N. E. 2d 265 .....30, 34, 39
Gamble-Robinson Fruit Co. v. Moreson, 53 N. D. 28, 204 N. W. 261 33
B. F. Goodrich v. Peck, 161 Ohio St. 202, 118 N. E. 2d 525 .....30, 34, 35, 37, 39
Grinnell Corp. et al v. Bowers, 167 O. S. 267, 147 N. E. 2d 657 .....31, 34
Gulf Fisheries v. MacInerney, 276 U. S., 124 16
Hooven and Allison Co. v. Evatt, 324 U. S., 652..... .....14, 15, 19, 22, 24, 27
Leisy v. Hardin, 135 U. S. 100 .....25, 28
Little, et al v. Smith, et al, 257 P. 959 33
Louisville Gas Co. v. Coleman, 277 U. S. 32, 41 19
Lowe v. Austin, 13 Wall., 29 .....11, 22
Magnano Co. v. Hamilton, 292 U. S., 40 27
Mexican Petroleum Corp. v. City of South Portland, 121 Me. 128, 155 Atl., 900 19
Mexican Petroleum Corp. v. Louisiana Tax Commission, 173 La. 604, 138 So. 117 .....16, 19
McCray v. United States, 195 U. S. 27 27
McHenry v. Alford, 168 U. S. 651 33
Morey v. Doud, 354 U. S. 457 .....36, 37
Ohio Oil Co. v. Conway, 281 U. S. 146 32
People v. Commissioners, 104 U. S. 466 25
Re: Taxas Pacific Guano v. Fertilizer Co. 32 Hawaii, 431 18

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B. Former Section 5701.08, Revised Code of Ohio, denies the appellant the equal protection of the laws for the reason that it discriminates against taxpayers engaged in the same business and holding the same kind of property for storage only 35
C. The entire exception cannot be removed from the statute 37
D. Section 5701.08, Revised Code of Ohio is unconstitutional to the extent that it results in the imposition of a tax upon personal property held by residents for storage only 41
Conclusion 42
Appendix I—Statutes 43
Appendix II—Opinion of the New Jersey Supreme Court in the case of Mexican Petroleum Corp. v. Borough of Roosevelt, et al 45

Cases Cited

Allied Stores of Ohio, Inc. v. Bowers, 166 O. S. 116, 140 N. E. 2d 411 37
American Steel & Wire Co. v. Speed, 195 U. S. 500.... 12
Brown v. Maryland, 12 Wheat., 419..10, 11, 16, 22, 24, 26
Case of The State Freight Tax, 15 Wall. 232 27
City of Galveston v. Mexican Petroleum Corp., 15 F. 2d, 208 18

Coe v. Errol, 116 U. S. 517 25
Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 565 40
East Ohio Gas Co. v. Tax Commission of Ohio, et al., 283 U. S. 465 13
Frost v. Commission of Oklahoma, 278 U. S. 515 39
General Cigar Co., Inc. v. Peck, 159 Ohio St. 152, 111 N. E. 2d 265 .....30, 34, 39
Gamble-Robinson Fruit Co. v. Moreson, 53 N. D. 28, 204 N. W. 261 33
B. F. Goodrich v. Peck, 161 Ohio St. 202, 118 N. E. 2d 525 .....30, 34, 35, 37, 39
Grinnell Corp. et al v. Bowers, 167 O. S. 267, 147 N. E. 2d 657 .....31, 34
Gulf Fisheries v. MacInerney, 276 U. S., 124 16
Hooven and Allison Co. v. Evatt, 324 U. S., 652..... .....14, 15, 19, 22, 24, 27
Leisy v. Hardin, 135 U. S. 100 .....25, 28
Little, et al v. Smith, et al, 257 P. 959 33
Louisville Gas Co. v. Coleman, 277 U. S. 32, 41 19
Lowe v. Austin, 13 Wall., 29 .....11, 22
Magnano Co. v. Hamilton, 292 U. S., 40 27
Mexican Petroleum Corp. v. City of South Portland, 121 Me. 128, 155 Atl., 900 19
Mexican Petroleum Corp. v. Louisiana Tax Commission, 173 La. 604, 138 So. 117 .....16, 19
McCray v. United States, 195 U. S. 27 27
McHenry v. Alford, 168 U. S. 651 33
Morey v. Doud, 354 U. S. 457 .....36, 37
Ohio Oil Co. v. Conway, 281 U. S. 146 32
People v. Commissioners, 104 U. S. 466 25
Re: Taxas Pacific Guano v. Fertilizer Co. 32 Hawaii, 431 18

Reitz v. Mealey, 314 U. S. 33 39
Sonneborn Bros. v. Cureton, 262 U. S., 506, 509 12
State Tax Com. v. Interstate Natural Gas Co., 284 U. S. 41 14
The License Cases, 5 How. 504, 574 .....11, 23
Turnpike Road Co. v. Stanford, 164 U. S. 578 31
Washington Chocolate Co. v. King Co. 21 Wash. 2d, 630, 152 P. 2d, 981, 324 U. S. 880 .....19, 25
Wheeling Steel Corporation v. Glander, 337 U. S. 562. 33

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Miscellaneous

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Statute Cited

Revised Code of Ohio—
Section 5701.08 .....39, 41

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Appellee.

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the Board of Tax Appeals of Ohio, unreported, is set forth in R., 8-25. The opinion of the Supreme Court of Ohio (R., 25-31) is reported in 166 Ohio St. 122, 140 N. E. 2d, 313.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered January 20, 1957 (R., 25). Application for rehearing was filed February 13, 1957 (R., 32). Rehearing was denied by order entered February 20, 1957 (R., 1, 46). Notices of appeal to this Court were then filed with the Supreme

Court of Ohio on April 30, 1957 (R., 2, 48). On June 25, 1957 the Supreme Court of Ohio extended the time for filing appellant's jurisdictional statement and record until August 3, 1957. On July 29, 1957, the Court granted a further extension of time until September 30, 1957. And on October 1, 1957 a final extension was ordered until October 31, 1957 (R., 45, 62). The jurisdictional statement and record were filed October 30, 1957, and probable jurisdiction was noted by order of this Court on January 6, 1958 (R., 63). The jurisdiction of the Court rests on 28 U. S. C., 1257 (2).

QUESTIONS PRESENTED

1. May a state statute constitutionally impose an *ad valorem* property tax upon bulk iron ores which have been imported from foreign countries and which were stored in the same form as imported, not commingled with other property of the taxpayer.

2. Does a state statute deny residents of the state the equal protection of the laws under the Constitution of the United States by imposing an *ad valorem* property tax upon residents' storage merchandise held for storage only, while at the same time excepting the storage merchandise of non-residents when similarly held for storage only?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Two constitutional provisions are involved. The first is Clause 2, Section 10, Article I of the Constitution of the United States which provides:

> "No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws * * *."

The second constitutional provision is Section 1 of the Fourteenth Amendment to the Constitution of the United States, which provides in part:

> "Section 1. * * * No state shall * * * deny to any person within its jurisdiction the equal protection of the laws."

The state statutes involved are Sections 5709.01, 5711.01, 5711.03, and former Section 5701.08, Revised Code of Ohio, which are set forth in Appendix I to this brief.

STATEMENT

The facts of this case have been stipulated (R., 33-36, 51-53). Appellant is an Ohio corporation having its principal office in Youngstown, Ohio, and with facilities for manufacturing iron and steel in Mahoning and Trumbull Counties, Ohio.

The tax return in question is that for the year 1954 and the iron ores, both imported and domestic, were listed in the return and assessed for taxation on the basis of their average monthly value by taking their values as of the last business day of each month during the preceding calendar year 1953, adding them together, and then dividing the total by 12, so as to obtain the average value.

Insofar as pertinent to the iron ores imported by appellant and held in storage, the stipulation (R., 33-36) reads:

> "4. There was included by Appellee, as taxable, for the year 1954 iron ores of a value of $1,393,232, which had been imported by Appellant from foreign countries, namely Brazil, Cuba, Mexico, Liberia and Canada. Exhibit D attached hereto and made a part hereof. Said imported ores were kept adjacent to Appellant's manufacturing facilities in a structure having two parallel walls, and on which there was located a movable ore bridge. (Exhibits A and B, supra).

"The Brazilian, Cuban, Mexican, and Liberian ores were purchased for ultimate use in Appellant's open hearth furnaces, and the Seine River ore was purchased for ultimate use in Appellant's blast furnaces. The Brazilian, Cuban, Mexican and Liberian ores were transported by ocean vessels to the port of entry into this country, which was either Baltimore or Philadelphia. In the movement of these ores a steamship was chartered for each movement which involved only a single and particular grade of ore. The imported ore was loaded into the vessel at the foreign port and transported in bulk by such vessel to the port of entry. At the port of entry the imported ore, consisting of the entire vessel cargo, was discharged from the vessel into railroad cars and transported in bulk by rail from the port of entry to Youngstown, Ohio. Upon arrival in Youngstown the cars were routed to a storage yard adjacent to the Appellant's manufacturing facilities. The imported ore, consisting of the entire vessel cargo, was there unloaded from the cars and placed in a separate storage pile in a separate area of the ore yard where it was held for ultimate use in the open hearth furnaces of Appellant. The importation of the Seine River ore (a single and particular grade of ore) involved a lake vessel movement from a Canadian port to Cleveland, Ohio. The imported ore was transported by vessel in bulk to the port of entry (Cleveland, Ohio). At Cleveland, Ohio the imported ore, consisting of the entire vessel cargo, was discharged from the vessel into railroad cars and transported in bulk from Cleveland by rail to Youngstown, Ohio. Upon arrival in Youngstown the cars were routed to a storage yard adjacent to Appellant's manufacturing facilities. The imported ore, consisting of the entire vessel cargo, was there unloaded from the cars and placed in a separate storage pile in a separate area of the ore yard, where it was held for ultimate use in the blast furnaces of Appellant.

"A separate storage pile was maintained for each grade of imported ore, i.e. Brazilian, Cuban, Mexican, Liberian and Seine River, and such particular grade of imported ore was not commingled with other ore or property of the Appellant except that different

vessel shipments of identical ore were piled one on top of the other as such additional shipments arrived (i.e. Brazilian on Brazilian, Cuban on Cuban, Mexican on Mexican, Liberian on Liberian, and Canadian on Canadian).

"From time to time, as needed, a portion of the imported ore in each separate storage pile was removed from such pile and transported to the stock bins in the case of the blast furnaces, and stock houses in the case of the open hearth furnaces for use in said blast furnaces and open hearth furnaces of the Appellant. (Exhibits A and B supra).

"Appellant maintained a supply of imported ores sufficient to meet its estimated requirements for a period of at least three months."

We turn now to the provisions of the stipulation concerning the domestic ores held in storage (R., 51-53):

"5. There was included by Appellee, as taxable, for the year 1954 certain tangible personal property, consisting of raw materials and finished seamless pipe. (sic) as set forth in Exhibit E, attached hereto and made a part hereof.

"Said tangible personal property consisted of:

"(A) Iron ore, produced in the United States and stored (in a rectangular structure having four walls and on two walls of which there was located a movable ore bridge) on Lake Erie public docks at Ashtabula, Ashtabula County, and Bedford, Cuyahoga County, and held for ultimate use in manufacturing. The Lake Erie public docks at Bedford (Cuyahoga County) were owned, controlled and operated by the Erie Dock Company, and the Lake Erie public docks at Ashtabula (Ashtabula County) were owned, controlled and operated by the Ashtabula and Buffalo Dock Co.

"(b) Raw materials consisting of iron ore, coal, scrap, limestone, fluor spar, ferros and additions stored adjacent to Appellant's manufacturing facilities in Trumbull and Mahoning Counties and held for ultimate use in manufacturing by Appellant. The domestic iron ore at Appellant's manufacturing facilities was stored in the same manner

and in the same type of structure as the imported ore. The Appellant's properties in Trumbull and Mahoning Counties were enclosed by wire fences and other enclosures.

"(c) Finished seamless pipe manufactured in Ohio and stored in the pipe storage yard adjacent to Appellant's manufacturing facilities in Mahoning County and held for ultimate sale by Appellant.

"With the exception of the iron ore stored on Lake Erie public docks, all inventories were located on properties of Appellant and were under its control at all times. (Exhibits A and B supra).

"The raw materials, consisting of domestic and imported iron ore, coal, scrap, limestone, fluor spar, ferros and additions, were in saleable form, as was the finished seamless pipe. Said raw materials were not held by Appellant for resale but were held by the Appellant for use in manufacturing. The finished seamless pipe was held for ultimate sale by Appellant."

The Board of Tax Appeals of Ohio reversed the Tax Commissioner's assessment against appellant's imported ores and affirmed the assessment against the domestic ores, raw materials and finished merchandise. Upon appeal, the Supreme Court of Ohio reversed the Board of Tax Appeals as to the imported ores and affirmed it as to the remainder of the items in issue.

SUMMARY OF ARGUMENT

IMPORTS

1. Imported bulk fungibles are entitled to protection under the imports clause equal with that accorded packaged goods. Such fungibles do not lose their character as imports any sooner than packaged goods and while they are stored by the importer in the same form they had when imported, and not yet used for the purpose, either sale or manufacture, for which they were imported, they are im-

mune from state taxation, *Brown v. Maryland,* 12 Wheat. 19 (1827); *Low v. Austin,* 13 Wall. 29 (1871); *The License Cases,* 5 How. 504 (1847); *East Ohio Gas Co. v. Tax Commission of Ohio, et al.,* 283 U. S. 465 (1931); *Hooven & Allison Co. v. Evatt,* 324 U. S. 652 (1945).

2. The rule of *Brown v. Maryland, supra,* as applied to imported bulk fungibles, is also supported by the state Court decisions which have been based upon it, and by the relatively few instances in which the rule has been the subject of litigation ever since its formulation 130 years ago.

3. The line drawn by decisions of this Court marking the point at which an import becomes taxable is both practical and reasonable. That the line might have been drawn differently is not so important as the fact that it has been drawn, and that it has been adhered to in successive cases, both federal and state. It affords a fair and workable standard for tax administrators and taxpayers, alike, without the necessity of every importer of raw materials resorting to continual litigation.

4. The decision of the Ohio Supreme Court imposes an unwarranted distinction between bulk fungibles and packaged imports by holding that shipments of bulk fungible imports lose their tax immunity when stored with different shipments of the same type or grade of commodity imported from the same country, and when a part of a shipment is removed for use.

5. The decision of the Ohio Supreme Court has the further disadvantage that it gives seaboard states a tax advantage over interior states, *The License Cases,* 13 Wall. 29 (1871), because the decision would subject bulk fungibles to local taxation almost immediately after their importation, even while held in storage at the port of entry.

6. Under Ohio law, the tax status of raw materials like the iron ores here in question is determined on the last

day of each month. If on that tax day, the imported fungibles are in storage in the same form as imported and not used they are exempt from tax, even though they may subsequently be used, *People v. Commissioners*, 104 U. S. 466 (1881); *Coe v. Errol*, 116 U. S. 517 (1886); *Leisy v. Hardin*, 135 U. S. 100 (1889); *Hooven & Allison Co. v. Evatt*, 324 U. S. 652 (1945).

7. Control and taxation within the area of foreign commerce was granted to the federal government exclusively by the Constitution, and because of this country's dependence upon imported goods, it is of vital importance that the federal government, not the states, retain control, and that the area of foreign commerce be free within the various states and territories.

EQUAL PROTECTION

1. Section 5701.08, Revised Code, is unconstitutional for the reason that it taxes personal property held by a resident for storage only while at the same time excepting such property when owned and stored by a non-resident with the result that residents are denied equal protection of the laws.

2. The residence of a taxpayer is not a characteristic of the property being taxed or of the type of business in which the taxpayer engages in this state. Where the tax is against property used in business, a classification of taxpayers to be valid must rest upon some difference in the quality or kind of property owned and the business use to which it is put by the taxpayer in the taxing state.

3. Taxpayers who own the same kinds of property and who use that property in the same ways for the same business purpose belong to the same class and must be treated equally.

4. The exception from tax granted to non-residents for personal property held for storage only is an integral part of Section 5701.08, Revised Code of Ohio, and cannot be severed from that section. When the Ohio Legislature came on to reconsider the exception in 1955, it amended it in certain respects but did not remove it. The only part of the exception which was removed was the language which limited the benefit of the exception to nonresidents and which discriminated against residents. Thus if any language can be removed from the statute, it is the phrase, "belonging to nonresidents of this state", since the Legislature by its action has indicated that it does not consider such language to be a necessary part of the exception.

5. Section 5701.08, Revised Code of Ohio, is unconstitutional insofar as it imposes a discriminatory tax upon the business property of residents held for storage only and must to that extent be voided.

ARGUMENT

I

IMPORTS

A. Imported Bulk Fungibles Do Not Lose the Immunity Granted Them Under Article I, Section 10, Clause 2 of the Constitution of the United States So Long As They are Held by the Importer in Storage and Not Used for the Manufacturing Purpose for Which They were Imported.

In deciding this case, the Ohio Supreme Court departed radically from the principle adopted by this Court in *Brown v. Maryland*, 12 Wheat. 419 (1827) and subsequent decisions which will be discussed below. Through paragraph 1. of its Syllabus the Ohio Court held:

> "1. If, pursuant to Clause 2 of Section 10 of Article I of the Constitution of the United States, the same protection from state taxes can be accorded to an imported fungible commodity such is iron ore as is accorded to goods imported in a package, such protection cannot extend to such iron ore (1) after it has been commingled with other iron ore imported at a different time, even though such other iron ore is of the same grade and was imported from the same place, and (2) after portions of such iron ore have been removed for use in manufacturing."

There is, of course, no authority at all to support the Court's prefatory holding which infers that imported fungibles are not entitled to the same constitutional protection as that accorded imported goods in packages. The Constitution speaks of "imports", without distinguishing between those which are fungible in character and those which are

packaged in one way or another. Every import, bulk and packaged alike, is entitled to the same constitutional immunity. Accepting that to be the correct and self-evident rule, the test proposed by the Ohio Court for determining the point after which imported fungibles lose their immunity cuts squarely across the test set down by this Court in *Brown v. Maryland, supra,* which holds that every import is exclusively within the federal domain so long as it is stored by the importer in the same form as imported and not sold or used.

We note at the outset that although *Brown v. Maryland, supra,* has been applied most frequently to packaged imports, the doctrine formulated by Chief Justice Marshall is not so limited, but applies with equal force to all imports so long as they retain their original form. Thus at page 441 and 442, the following appears:

> "It is sufficient for the present to say, generally, that when the importer has so *acted upon* the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the state; but while remaining the property of the importer, in his warehouse, in the *original form* or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution." (Emphasis added)

In the later case of *Low v. Austin,* 13 Wall. 29 (1871), at page 34 of its opinion, the Court quoted with approval the comment of Chief Justice Taney in *The License Cases,* 5 How. 504, 574 (1874), thus:

> "Indeed, goods imported, while they remain in the hands of the importer, in the *form and shape* in which they were brought into the country, can, in no just sense, be regarded as a part of that mass of property in the State usually taxed for the support of the State Government.'" (Emphasis added)

And in *American Steel & Wire Co. v. Speed*, 195 U. S. 500 (1904), Justice White stated the rule of *Brown v. Maryland* with approval on page 521 as follows:

> "Thus, in *Brown v. Maryland* there was an absolute want of power to tax imports, and it was held that a state enactment which operated to tax imports, whether directly or indirectly, was within the positive prohibition. In other words, that imports could not be taxed at all until they had completely lost their character as such."

See also *Sonneborn Bros. v. Cureton*, 262 U. S. 506, 509 (1922).

The facts of the instant case show that the appellant imported ores from several foreign countries. Each shipment came by steamship to a port of entry where it was loaded into railroad cars and carried on to appellant's storage yards at Youngstown, Ohio. Here the shipment was removed from the cars and placed in a separate pile for storage. Subsequent shipments of identical ore, imported from the same country, were stored in the same pile, but there was no commingling whatever with domestic ores or other property of appellant. A supply of imported ores to meet requirements for at least three months was maintained at all times. Nothing was done to the ore during its storage, and so far as concerns its form while in storage, it could as well be on the dock at the port of entry, or for that matter, on the dock at the port of export. From time to time, some of the ore was removed from the piles and taken to a stock bin or stock house, and from there it was withdrawn and introduced directly into the furnaces. To avoid complicating the issue unduly, the taxability of the ores in the bins and houses has not been contested by the appellant. However, the attempt by Ohio to tax the ores which remained in storage in the storage yards, separate

from the rest of appellant's property and in the same form as it was when imported, is an unconstitutional extension of the state's power in derogation of that granted the federal government by the Constitution of the United States.

Two cases decided by this Court come so close on their facts to the present as to be indistinguishable for all practical purposes. The first is *East Ohio Gas Co. v. Tax Commission of Ohio, et al.*, 283 U. S. 465 (1931). Although dealing with interstate commerce, the Court applied the analogy and rationale of the original package or form doctrine in arriving at its conclusion. Natural gas, a fungible, was transported in interstate commerce by means of pipes to distribution stations. The gas was then stored in these pipes adjacent to the stations until, as the occasion demanded, a quantity would be released and moved through the distribution stations, where it was changed in form by being relieved of nearly all pressure, and thence it was sold to consumers. The Court wrote on page 471 of the opinion:

> "The treatment and division of the large compressed volume of gas is like the breaking of an original package, after shipment in interstate commerce, in order that its contents may be treated, prepared for sale and sold at retail."

But the gas remaining in the pipes ahead of the distribution stations, in the original form, was held to be still an object of interstate commerce and immune from tax. So here, such portions of ore as are broken from appellant's storage piles and moved to the stock bins and stock houses at the plant, preparatory to the manufacture of steel, may possibly be taxable, but certainly not the ore which stays in storage in the storage piles. As to it, there has been no manufacture, and should the need arise, the

ore could just as easily be shipped on to another storage site, or to another plant in another state for use there in manufacturing. See also Justice Holmes' analysis in *State Tax Com. v. Interstate Natural Gas Co.*, 284 U. S. 41 (1931).

The second authority upon which the appellant relies is *Hooven and Allison Co. v. Evatt*, 324 U. S. 652 (1945). The principles established by that case are found on page 665 thereof:

> "Plainly if and when removed from the package in which they are imported, *or when used for the purpose for which they are imported*, they cease to be imports and their tax exemption is at an end." (Emphasis added)

And on page 666, the principle is reiterated:

> "This Court has pointed out on several occasions that imports for manufacture cease to be such and lose their constitutional immunity from state tax at or when they are *subjected to the manufacture for which they* were *imported*, * * *, *or* when the original packages in which they were imported are broken, * * * But no opinion of this Court has ever said or intimated that imports held by the importer in the original package and before they were subjected to the manufacture for which they were imported are liable to state taxation." (Emphasis added)

Examination of the record will disclose that in this case, the imported ores, while stored in appellant's ore yards, were not in any sense being used in the manufacture for which they had been imported.

In the *Hooven & Allison* case the taxpayer imported bales of hemp and other fibers, and stored them in its warehouse at its Ohio factory, preliminary to their being used in manufacturing cordage and similar products. As needed, the hemp and fibers were taken from storage and processed pursuant to manufacture. Now in the present

case, the Ohio Court has sustained the same Ohio *ad valorem* property tax against appellant's imports as was struck down by this Court in *Hooven & Allison*, even though the imports here are stored and handled in exactly the same way as the hemp and fibers were in *Hooven & Allison*. To be sure, the Ohio Court has shifted its ground and reasoning, but the effect of its holding is to revert to the position it took in *Hooven & Allison*, and which this Court reversed.

Why iron ores, or any other raw materials which because of their very nature are required to be imported in bulk should be denied, before sale or use, the same protection from state taxation as that granted by the Constitution to less bulky imports, the Ohio Court did not pause to explain. The Constitution by its terms expressly protects *all* imports, and just as a package is not broken until it is opened, nor sold until it is bought, so raw materials imported in bulk are not changed in form or subjected to the manufacture for which they were imported until they are used in processing, and this irrespective of the Ohio Court's notion, that somehow the processing of a part "processes" the whole.

Neither can it make any substantial difference that the storage yards are near the plants at Youngstown. In *East Ohio Gas, supra*, the supply pipes ran up to the distribution stations, and in *Hooven & Allison Co. v. Evatt, supra*, the taxpayer's storage warehouses abutted the manufacturing area. Chief Justice Stone, writing for the court, pointed out on page 664 of the opinion:

> "For the purposes of the immunity it has not been thought, nor is there reason for supposing, that it matters whether the imported merchandise is stored in the original package in the importer's warehouse at the port of entry or in an interior state."

Another decision of this Court, *Gulf Fisheries v. MacInerney*, 276 U. S. 124 (1928) bears upon the problem at hand. There the Court, speaking through Justice Brandeis, held that fish imported in bulk ceased to be imports after they had been processed by being beheaded, gutted, gilled and iced. The implication which must be drawn is that prior to such time, and while they were in storage, they were imports and continued so until actually subjected to the processing operations.

Since the decision in *Brown v. Maryland*, over one hundred and thirty years ago, there has not been a single holding by this Court which would call for sustaining the Ohio Court's construction of the imports clause, and it is proved from the relative paucity of litigation during those years in both this Court and state courts that the rule of Marshall, Taney and Stone is a fair and practical approach, consistent with the intent and purpose of the framers of the Constitution.

B. The Rule Established in Brown v. Maryland, Supra, Has Also Found Expression in Various State Courts' Decisions and Derives Support from Them.

The rule that imported bulk fungibles stored in the same form as imported do not lose the tax immunity granted by Article I, Section 10, Clause 2, until removed from storage and subjected to the specific use for which they were imported, has proved itself to be a practical and workable rule.

The case of *Mexican Petroleum Corp. v. Louisiana Tax Commission*, 173 La. 604, 138 So. 117, (1931), involved crude oil imported in bulk from Mexico and Venezuela in tank ships. When the oil reached the port of entry, it was pumped from the ships through pipes into land tanks

where it was stored until needed. At different times part of the oil was withdrawn for use from the tank where stored and when new shipments of oil identical in grade to that originally stored in a particular tank, arrived, it was added to that tank. Various grades were not commingled. The Court ruled that since there was no commingling or processing of the oil while in the storage tanks, and since the oil retained the same form as when imported, it did not cease to be an import. We quote the opinion at pages 614 and 615:

"It is obvious under the authorities cited, and especially under Sonneborn Bros. v. Cureton, 262 U. S. 506, 43 S. Ct. 643, 67 L. Ed. 1095, that because the oil came to a state of rest at Destrehan to be there refined, it did not lose its character as an import. A more important question concerns the manner of importation. Our appreciation of Brown v. Maryland, and the authorities cited, resting upon it, is not that the property must be imported necessarily in packages to be in a situation, after delivery, to retain its character as an import, but, where such is not the manner of importation, it suffices that the import, to retain its character as such, remain in the original form in which imported. Some property is of such a physical nature that it is inexpedient, unwise, or too costly to import it in packages. It was not the intention, however, to exclude such property from the immunities of imports. Of this nature is crude oil. The only practical way of importing it is in bulk. To import it in barrels would make the oil too costly to be used in general commerce, whether for heating purposes, or for the manufacture of important articles of gasoline, kerosene, asphalt, or other products.

"* * * * * * * * * *

"The circumstances of pumping the oil into tanks, in unloading it, containing each about 1,000 barrels of oil of the kind and quality pumped into it—a circumstance which could not be practically avoided in the ordinary course of things—did not cause the oil to lose its character as an import. There was no change

here in the oil through a process of mixing, for the oil put in each tank was identical in kind and grade with that already in it. Besides, the record justifies the conclusion that the oil already in the tanks was oil imported by plaintiff, and still retained its character as an import, and hence there was no mixing of the oil with oil that had become incorporated into the general mass of the property of the country."

A second case is *City of Galveston v. Mexican Petroleum Corp.*, 15 F. 2d 208 (District Court, S. D. Texas (1926)), wherein it was held that oil imported in bulk to fill sales contracts, and stored in tanks at Galveston after being removed from the tankers, was still an import, stored in the same form as imported, and therefore protected by the Federal Constitution.

A further authority dealing with the import character of bulk fungibles is *Mexican Petroleum Corporation v. The Borough of Roosevelt,* (1919) decided by the Supreme Court of New Jersey (unreported, see Appendix II). The taxpayer imported oil in bulk and stored it in large tanks prior to use. The Court held that because nothing had yet been done by the importer to change the character of the oil in the tanks, it was immune from tax while so stored.

Another case in which a court considered the problem of whether raw materials imported in bulk are taxable while stored in the original form is *Re: Taxes Pacific Guano & Fertilizer Co.,* 32 Hawaii 431, (1932). The taxpayer there imported phosphate rock in bulk to be used for manufacturing fertilizer. The rock was stored at several of the taxpayer's warehouses in the territory of Hawaii. On page 441, the Court makes the following observation:

"The phosphate rock was brought in ships in bulk. It could not have been stored in original packages, for it did not come in any packages whatever. It could

be an undue stretch of language to say that the ships were the original packages. The test as to 'original packages' does not apply in such a case. The phosphate rock, within the decision in the Maryland case, was in the warehouse of this taxpayer in the 'original form' in which it was imported, that is, it was in bulk; it was being kept in the warehouses in bins separate from the general mass of property in this Territory."

See also *Washington Chocolate Co. v. King Co.*, 21 Wash. 2d 630, 152 P. 2d 981, *cert. denied*, 324 U. S. 880 (1945);

In direct conflict with the rule of the above cases is *Mexican Petroleum Corporation v. City of South Portland*, 121 Me. 128, 155 Atl. 900 (1922). That case held that the ships used to import oil in bulk were the "packages" and that they were broken when the oil was unloaded and pumped into onshore storage tanks. Even though this decision pre-dated all but one of the cases cited herein, none of them followed it, and it was expressly disapproved in *Mexican Petroleum Corporation v. Louisiana Tax Commissioner, supra.*

The Attorneys General of the following states have cited the *Hooven & Allison* case as authority for opinions published since 1945: Alabama, California, Maryland, Minnesota, Nebraska, Ohio, Oregon and Wisconsin.[1] Only two of those opinions sought to qualify the *Hooven* case in any respect, those of the Attorney General of Ohio and the

[1] See 76 Report of Atty. Gen. of Alabama 72-77 (Opinion dated August 30, 1954); 24 Ops. Atty. Gen. 287 (Calif. 1954); Tht Daily Record (of Baltmore, Maryland) of January 22, 1958 (Opinion dated December 12, 1954); 2 CCH Maryland Tax Reporter para. 200-152 (December 19, 1956); The Daily Record (of Baltimore, Maryland) of October 18, 1955 (Opinion dated August 8, 1955); 30 Ops. Atty. Gen. 220 (Md. 1954); Report of Atty. Gen. to the Governor, State of Minnesota, p. 333 (Opinion No. 167 dated May 24, 1954); Report of the Atty. Gen. of the State of Nebraska, p. 420 (Opinion dated May 2, 1945); Opinions of the Atty. Gen. of Ohio (Opinion No. 760, February 26, 1946); 1 CCH Oregon Tax Cases para. 200-330 and 200-676 (Summaries of Opinions of Atty. Gen. Ore. of November 2, 1955, October 5, 1955, March 20, 1957); 30 Ops. Atty. Gen. 563 (Wis. November 10, 1959).

Attorney General of Wisconsin. It is not surprising, therefore, to find this case from Ohio consolidated for argument with a case from Wisconsin.

The precise question involved in this case, was recently reviewed by the Attorney General of Maryland, who held that "so long as (iron) ores from different foreign sources are kept in separate stockpiles in the same form and condition in which received, they would, in our opinion, retain their original characteristics as imports." 2 *CCH Maryland Tax Reporter* paragraph 200-152 (Opinion dated December 19, 1956).

The Maryland Attorney General had previously considered the same problem with respect to ilmenite, a black sand-like ore imported from India, and expressed the opinion that "the fact that an imported material may be of such character as not to be susceptible of packaging does not destroy the immunity (afforded to it by the Constitution) so long as it is not sold or appropriated to the use for which it is designated by the importer." 30 *Ops. Atty. Gen.* 220 (1945). In a subsequent opinion dated December 12, 1957, and reported in The Daily Record (of Baltimore, Maryland) of January 22, 1958, the Attorney General confirmed his earlier opinions and held that imported olive oil held in storage prior to withdrawal for blending with other oils was not subject to state taxation.

The obvious purpose of the original package or form doctrine is to mark out a line which will distinguish the juncture at which imported goods become a part of the general mass of property within a state and therefore taxable. Decisions of this Court and decisions of the various states have established the points of the line to be (1) when the import is sold by the importer, or (2) when the original imported package is broken, or (3) when the import is actually used to meet the purpose for which it was

imported. Until one or the other of those points is crossed, the import remains within the scope and the immunity allowed by the Federal Constitution.

In what has become a classic dissent, Justice Holmes said in *Louisville Gas Co. v. Coleman*, 277 U. S. 32, 41 (1928):

> "When a legal distinction is determined as no one doubts that it may be, between night and day, childhood and maturity, or any other extremes, a point has to be fixed or a line has to be drawn, or gradually picked out by successive decisions, to mark where the change takes place. Looked at by itself without regard to the necessity behind it, the line or point seems arbitrary. It might as well or might nearly as well be a little more to the one side or the other, but when it is seen that a line or point there must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the legislature must be accepted unless we can say that it is very wide of any reasonable mark."

So also must it be with the principles of constitutional law evolved through the repeated decisions of the courts. That the line of immunity for imports might have been drawn or developed a little differently, is not nearly so important as the fact that it has been drawn and that as drawn, it has been applied consistently ever since its beginning. Very few rules have withstood so severe a test of time without having been surrounded and modified by the imposition of conditions and exceptions. State courts and state tax administrators are zealous in guarding against tax exemptions and quick to pick up and oppose those which cannot be justified or which are vague and uncertain. That this has not happened to the present rule for imports is an argument in itself for the validity of the rule.

C. The Decision of the Supreme Court of Ohio Makes An Unwarranted Distinction Between Bulk Fungible and Packaged Imports.

The following statement appears in the opinion of The Ohio Board Tax Appeals (R. 14):

> "The exceptional men who produced the constitution, and the particular provision drawn in question could readily visualize, or had already experienced, that certain commodities would be imported in bulk which were not susceptible of packaging. Hence, they generally provided that no state should lay imposts or duties on imports until that properly had lost its import character. They did not limit the provision's applicability to packaged imports."

From a cursory reading it might seem that the Ohio Supreme Court had adhered to the Constitution and the decision of this Court in *Brown v. Maryland, supra* by expounding a rule, merely limiting the tax exemption for fungible imports. However, in practical context the two exceptions constituting the Ohio Court's pronouncement will have the effect of laying imported fungibles open to state taxation in nearly every situation. The first exception in the Ohio Court's rule is that the removal of a particle of iron ore or any part of an imported shipment of fungibles, subjects the whole shipment immediately to taxation. The second exception is that the mere storing together of two shipments of the same imported commodity is sufficient to destroy the import character of both. Within these bounds, bulk imports will be subject to state taxation almost immediately after their importation even though not yet used or sold.

In *Brown v. Maryland, Low v. Austin,* and *Hooven & Allison Co. v. Evatt,* packages were continuously being taken out for sale or use, and undoubtedly new shipments

of packages were being added to the old, but at no place did this Court indicate that the taking of a package from a shipment, of the adding of a new package to a shipment, influenced the taxability of the whole shipment. To the contrary, without exception, the cases hold that an imported package until broken or until devoted to the use for which it was imported, is within the protection of the Federal Constitution and under the jurisdiction of the Federal Government.

In fact, *Hooven & Allison* stressed the point that goods imported for use in manufacturing had to be extended the same immunity and equality of treatment as those imported for sale, and by like token, fungible imports must be on a par with packaged imports. The Ohio Court in the instant case advanced no reason why, if given two shipments of imports, one in bulk and the other in packages, the former should come under the control of states sooner than the latter. Decisions of this Court have never required importers of packaged goods to keep each entire shipment intact and unused or separate from other shipments, and to subject importers of bulk fungibles to a different, more rigorous standard is a distinction without any real or justifiable difference.

Furthermore the discriminatory treatment of bulk imports that would result from the Ohio Court's holding strikes at one of the basic reasons behind the original package or form doctrine. Chief Justice Taney in the *License Cases, supra,* pointed out that the purpose of the doctrine was to protect interior states from the unfair tax advantage that might accrue to seaboard states, see too Justice Black's dissent in *Hooven & Allison Co. v. Evatt, supra.* If allowed to stand, the decision of the Ohio Court and the distinction it imposes between bulk and packaged imports, would revive the mischief that the import clause was de-

signed to end, for under the Ohio Court's decision, ore shipments, and shipments of bulk fungibles in general, stored on docks or elsewhere in the state of the port of entry would become taxable by the state the moment two shipments of the same ore were piled on one another, or any part thereof was removed by the importer for ultimate use sometime in the future.

No matter how viewed the Ohio Court's decision is contrary to the imports clause of the Constitution as construed by the decisions of this Court. In reality all that the Ohio Court is doing is placing upon this Court the burden of hearing a reargument of *Hooven and Allison, supra.*

D. The Tax Consequences for Imported Merchandise Are Determined as of Tax Day.

For all taxes, there is a day certain on which the taxable status of property is fixed, 3 *Cooley, Taxation,* 4th Ed. Section 1062, pages 2138-2145. That day for the Ohio Personal Property Tax is January 1, of each year [2], excepting for inventories of raw materials such as the imported ores here involved, and as to them their status is determined on the last business day at the end of each month during the preceding calendar year.[3] If on those days the imported ores lie in storage in the same form imported, and not yet used in manufacturing, or removed to the point of use, then they should be exempt from tax under the doctrine of *Brown v. Maryland, supra.*

This in effect was the holding of *Hooven & Allison Co. v. Evatt, supra,* that imports are taxable depending upon how they actually stand on the day or days when the tax

[2] Section 5711.03, Revised Code of Ohio, Title 57, Page's Ohio Revised Code, page 103; Volume 6 Baldwin's Revised Code and Service, Title 57, page 53.

[3] Section 5711.16, Revised Code of Ohio, Title 57, Page's Ohio Revised Code, page 113; Volume 6 Baldwin's Revised Code and Service, Title 57, page 58.

enures, and not on what may eventually be done with them later. Other decisions of this Court have accepted that as the valid, indeed the only workable, criterion of taxability.

It was held in *People v. Commissioners,* 104 U. S. 466 (1881), that capital in the form of cash owned by the taxpayer on tax day was taxable by the state even though subsequently it might be invested in the purchase of products which were exports.

In *Leisy v. Hardin,* 135 U. S. 100, (1889), the Court stated that the distinction between a proper and improper tax on imports did not turn upon when the act of importation occurred, nor upon when the property might be used, but rather upon the determinable fact that when the tax was imposed the property had at that time already been acted upon by the importer so as to change its form from that which it had at the time of import.

In the earlier case of *Coe v. Errol,* 116 U. S. 517, (1886), this Court held that the taxpayer's intention to introduce fungibles into the stream of interstate commerce did not thereby exempt them from local taxation. The actual fact of introduction rather the owner's intent as to their future disposition was deemed to be the controlling agent.

And see also, *Washington Chocolate Co. v. King County,* 21 Wash., 2d 630, 152 p. 2d 981, *cert. denied,* 324 U. S. 880 (1945).

Appellant has claimed exemption in this case only for those ores which were stored in their original form away from the area of manufacturing on tax valuing day. The Ohio Supreme Court, on the other hand, by device of the fiction that the removal of part of a shipment for use removed the whole shipment, and that the storing of two shipments together removed both for use, substituted a test which depends upon the state of the importer's mind rather than the actual state of the import on tax valuing day.

It is conceded that eventually all of the ores in storage will be used, but until they are used the importer has not acted upon them. The import status of appellant's shipments of ores terminates only as to that part which on tax day has been put to use, and just as the use of one package from a shipment, or the opening of one package out of a shipment for the purpose of using it, does not affect the other packages stored in the same place or received in the same shipment, so neither does the removal by the appellant of the equivalent of a package or packages for use affect the ore which remains undisturbed in storage on tax day. We have not yet arrived at the time when an importer can stand back and think raw materials into a changed form, any more than the appellant can think iron ores into iron or steel products.

E. The Purpose of the Imports Clause was to Confer the Control of Imports Exclusively Upon the Federal Government as Distinguished from the Various States and Territories.

The control of imports must reside in but one sovereign, the Federal Government. It was held in *Brown v. Maryland, supra*, that the right to import merchandise carried with it the right to store the merchandise in the same form or package as that in which it was imported. Presumably the Court felt that the act of importing for sale and the act of storing the import were so closely knit as to be practically indistinguishable, and consequently a tax on the right to store was just as much a tax on the right to import. It is equally true that the right to import raw materials includes the right to store them pending their use, for what else could be done with them? Were the State of Ohio permitted to tax this appellant on its im-

ports while they are yet in storage, then so could every other state and territory tax imports similarly held in storage, and we would point out in this regard that the power to tax carries with it the power to impose a confiscatory tax, *Magnano Co. v. Hamilton*, 292 U. S. 40 (1934); *McCray v. United States*, 195 U. S. 27 (1904), as well as the power to regulate by tax, the *Case of The State Freight Tax*, 15 Wall. 232 (1872). Instead, therefore, of one sovereign setting and administering the policies governing the importation of goods the area would be opened to the control of many sovereigns. It is of a paramount importance to prevent control by more than one sovereign, for there are many sections of the country where strong hostility exists to low tariffs, foreign trade, foreign aid; or in fact anything other than that local in nature. If these sections were given the power to tax imports, they would most certainly use that power in an effort to prevent those imports certain selfish business interests do not favor, something which would be injurious to the overall national economy.

Unlike the commerce clause which contains no prohibition against state taxation or regulation of interstate commerce, the imports clause expressly enjoins that:

> "No State shall, without the consent of Congress, lay any Imposts or Duties on Imports or Exports, except, what may be absolutely necessary for executing its inspection Laws * * *"

This Court recognized that the Import Clause was intended to confer upon the National Government the exclusive power to determine when and to what extent imports should be taxed in *Hooven & Allison Co. v. Evatt, supra*, at page 656 of the opinion.

If Congress had wanted to, it could have permitted the states to impose taxes upon imports. The same clause of

the Constitution which protects imports from state tax also grants the Congress the power to permit taxation. But no such legislation has been enacted, which is evidence of a Congressional intent that imports shall not be taxed. *Leisy v. Hardin*, 135 U. S. 100 (1890).

It is for the Congress to decide in the first instance where and to what extent local taxation or regulation of imports is to be permitted, and in the absence of permissive federal legislation on the subject, the states are on excluded from encroaching upon foreign commerce. It must be concluded that this is an area where the interests of the nation as a whole can be served only by the Federal sovereign.

D. Conclusion.

For the reasons above stated, the appellant respectfully requests that the decision of the Supreme Court of Ohio be reversed as contrary to Article I, Clause 2, Section 10 of the Constitution of the United States, and the decisions of this Court.

II

EQUAL PROTECTION

A. Former Section 5701.08, Revised Code of Ohio, Denies the Appellant the Equal Protection of the Laws for the Reason That It Imposes a Tax upon the Storage Merchandise of Domestic Corporations Held for Storage Only, While at the Same Time Excepting from Taxation the Storage Merchandise of Non-residents When Similarly Held for Storage Only.

Former Section 5701.08, Revised Code, provided as follows:

> "As used in Title LVII of the Revised Code:
>
> "(A) Personal property is 'used' within the meaning of 'used in business' when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise; *but merchandise or agricultural products belonging to a nonresident of this state is not used in business in state if held in a storage warehouse for storage only.* Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are 'used' when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere."

The section was amended effective September 30, 1955, and the italicized clause was changed so as to read:

> "* * * and merchandise and agricultural products shipped from outside of this state and held in this state in a warehouse or a place of storage for storage only and for shipment outside of this state are not used in business in this state."

It will be noted that the 1955 amendment removed the phrase "belonging to a nonresident of this state", and therefore the section as it presently reads treats both residents and nonresidents alike. Before the amendment, however, the "storage only" provision applied exclusively to nonresidents.

The term "storage only" has been construed by the Ohio Supreme Court to mean merchandise which was held in storage by the owner, and not used or processed during storage.

In *General Cigar Co., Inc. v. Peck,* 159 Ohio St. 152, 111 N.E. 2d 265 (1953) the Court held that stored and unprocessed tobacco was entitled to tax exception because it was owned by a nonresident corporation.

> "1. The exception in the definition of 'used in business', contained in Section 5325-1, General Code, that 'merchandise or agricultural products belonging to a nonresident of this state if held in a storage warehouse therein for storage only,' is not applicable to products upon which essential steps in manufacturing or processing are carried on during the period of storage, *but is applicable where nothing is done in connection with such storage except what is necessary for the preservation of the stored merchandise or agricultural products.*" (Emphasis added)

In the later case of *B. F. Goodrich v. Peck;* 161 Ohio St., 202, 118 N.E. 2d 525 (1954), the Ohio Court followed the above holding and applied it to a manufacturer (the company was also engaged in retailing) which held goods and raw materials in a central warehouse for sale and use in manufacturing in this state. Paragraphs 1 and 2 of the Syllabus read:

> "1. In the absence of the expression of a contrary legislative intention, a corporation incorporated under the laws of a foreign state will generally be included by the use in a statute of the word 'nonresident'.

"2. Property may be held 'for storage only' even though its owner intends at some subsequent time to sell it or to use it as manufacturing material. (*General Cigar Co., Inc. v. Peck, Tax Commr.*, 159 Ohio St., 152, followed)"

Subsequently the Court clarified the above holdings in *Grinnell Corp. et al v. Bowers*, 167 Ohio St., 267, 147 N.E. 2d 657 (1958):

"Property cannot be considered as 'held in a storage warehouse for storage only' within the meaning of Section 5701.08, Revised Code, as it read prior to September, 1955, in those instances where it is located at the place where it is to be used in manufacturing or at the place where it was manufactured into a product or at the place from which it is in effect to be delivered by a taxpayer directly to a customer."

Appellant waives its claim as to those inventories of raw materials and finished pipe which are stored at the plant where they are to be used or were used in manufacturing (R., 52). However, the domestic iron ore stored on the Lake Erie Public Docks at Ashtabula, Ashtabula County, and Bedford, Cuyahoga County, for later shipment by rail to Youngstown, is entitled to exception from taxation under the holdings of the above cases. The only feature present in this case that prevents this appellant from receiving the equal benefit of the exception provided for nonresidents is the fact that it is a domestic corporation, having filed its incorporation papers in Ohio rather than in some other state. The discrimination thus created deprives domestic corporations, and residents, of equal protection of the laws.

The equal protection clause of the Constitution requires that all persons, including corporations, *Turnpike Road Co. v. Stanford*, 164 U. S., 578, (1896), who are similarly situated shall be treated alike. The principle was stated

by this Court in *Ohio Oil Co. v. Conway*, 281 U. S., 146, (1930) as follows on pages 159 and 160:

> "The applicable principles are familiar. The states have wide discretion in the imposition of taxes * * * It may grant exemptions * * * In levying such taxes the state is not required to resort to close distinctions or to maintain a precise scientific uniformity with reference to composition use or value * * *
>
> With all this freedom of action, there is a point beyond which the state can not go without violating the equal protection clause. The state may classify broadly the subjects of taxation, but in doing so must proceed upon a rational basis. The state is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'"

Unless there is a valid and substantial difference between two taxpayers and unless that difference bears an immediate relationship to the thing taxed and the nature of the tax, the Constitution prohibits any discrimination between them.

The Ohio levy in question is an *ad valorem* tax against all personal property located in the state and used in business in Ohio. The tax falls directly upon the property itself. Obviously the owner's residence, or the state in which a corporation may happen to have filed its original incorporation papers, is a characteristic of ownership, and is not representative of the amount or kind of personal property used by a company for its business in this state. The rule is broadly stated in 1 *Cooley, Taxation*, page 717:

> "Property can be segregated into classes only by reason of difference in it which afford a ground for different treatment in reference to taxation. The reasons for classification must be such as naturally inhere in the subject matter. Differences in the use of

property, may be the basis of classification * * * *So property must be classified by characteristics possessed by it and not by the incidents of ownership.*" (Emphasis added)

And that principle was recognized by this Court in *McHenry v. Alford,* 168 U. S., 651 (1898) on page 666 of the opinion where it was observed in passing that "we agree that property of the same kind and under the same condition and used for the same purpose cannot be divided into different classes for purposes of taxation and taxed by a different rule simply because it belongs to different owners * * *". See also, *Gamble-Robinson Fruit Company v. Moreson,* 53 N.D., 28, 204 N. W., 261 (1925), *Little, et al v. Smith, et al* 124 Kan. 237, 257 P. 959 (1927).

The Ohio personal property tax came before this Court for review in *Wheeling Steel Corporation v. Glander,* 337 U. S., 562 (1949) and the same kind of discrimination was involved there as is present in this case. The Ohio Tax Commissioner attempted to tax accounts receivable of foreign corporation, and except from taxation those of domestics. As in the case at hand the difference between taxation and exception was one simply of residence. At page 572 of its opinion, the Court held the following:

"If on the taxing date one of these petitioners (a foreign corporation) and an Ohio competitor each owns an account receivable of the same amount from the same out-of-state customer for the same kind of commodity, both shipped from a manufacturing plant in Ohio and both sold out of Ohio by an agent having an office out of the State, appellant's account receivable would be subject to Ohio's ad valorem tax and the one held by the competing domestic corporation would not."

"*It seems obvious that appellants are not accorded equal treatment, and the inequality is not because of the slightest difference in Ohio's relation to the decisive transaction, but solely because of the different residence of the owner.*" (Emphasis added)

This holding applies with the same force to the present case, for the appellant here is discriminated against in exactly the same way and for exactly the same reason. The distinction made between merchandise stored by a foreign corporation and that stored by a domestic turns exclusively upon the taxpayer's residence and therefore discriminates against the appellant as much as did the tax which this Court struck down in the *Wheeling Steel* case.

In these times of broad and widespread business activity the fact that a company filed its papers of incorporation in one state does not mean that it cannot or ordinarily will not conduct business in some other state. In the recent case of *Grinnell Corp. et al v. Bowers,* 167 Ohio St., 267, 147 N. E. 2d 657, (1958) ten corporation taxpayers, all of them nonresidents, sought the benefit of the storage only exception for their business property, and likewise the taxpayers in *General Cigar Co., Inc. v. Peck, supra,* and *B. F. Goodrich Co. v. Peck, supra,* were nonresident corporations. Each of them conduct extensive business operations in this state, in most instances of greater scope than many domestic corporations.

It is apparent that from an examination of a corporation's business activities or its business property, without more information, it would be impossible to know whether it was incorporated in Ohio or in another state. And it is equally apparent that if a company were incorporated in some other state that would have little or no effect on its business activities in Ohio or on the property which it

Since the tax in question is an *ad valorem* tax against personal property, an assessment against this appellant merely because of its residence, which is a characteristic of it, the taxpayer, and not of the property being taxed, will result in an arbitrary discrimination without any relationship to the subject of the tax, which is property used in business.

B. Former Section 5701.08, Revised Code of Ohio, Denies the Appellant the Equal Protection of the Laws for the Reason that It Discriminates against Taxpayers Engaged in the Same Business and Holding the Same Kind of Property for Storage Only.

In *B. F. Goodrich Co. v. Peck*, 161 Ohio St., 202, 118 N.E. 2d 525 (1954) the Court held that the taxpayer was entitled to exception from the tax as to tire cord, a raw material which it used in manufacturing and which was stored at the taxpayer's warehouse in Ohio for subsequent shipment to its plants in Akron, Ohio. The Court reasoned that so long as the cord was in storage and was not used in any manufacturing or processing operation, it was held for storage only. In answer to the Tax Commissioner's contention that the cord could not be so considered because the taxpayer intended at some later date to remove it and put it to use in manufacturing, the Court stated on page 205 of its opinion:

> "It may be observed that property is never placed in storage by its owner unless the owner intends to use it in some way later on. Therefore the statutory provision involved would be meaningless if given a construction such as contended for by appellant. Likewise, we believe the decision of this court in *General Cigar Co., Inc. v. Peck, Tax Commr.*, 159 Ohio St., 152, 111 N.E. (2d), 265, necessarily disposes of any such contention."

Both the taxpayer in *Goodrich* and the appellant in this case are manufacturers with plants in Ohio; both stored raw materials at a central point in this state; and both used those raw materials for manufacturing purposes in this state. Despite these similarities, the tire cord stored by the taxpayer in *Goodrich* was excepted from the Ohio personal

property tax, whereas the iron ore stored by this appellant has been taxed. The resultant discrimination does not rest on any difference between the two taxpayers' business operations, or between the kinds or amounts of property stored by them, or their methods of storage, but soley on the fact that the B. F. Goodrich Company is a nonresident and this appellant is a resident.

In some instances this might be sufficient for a classification of taxpayers, but not here where the tax is levied against property and is based upon the business use of that property. In order to be valid, any classification of taxpayers for purposes of the Ohio tax must be a classification by reason either of some characteristic of the storage property, or some difference in the business use to which the property is put. Residence is neither.

A recent decision of this Court leaves little doubt but that the tax in this case is invalid. The issue in *Morey v. Doud*, 354 U. S. 457, (1957) turned upon a state statute requiring firms in the business of selling or issuing money orders to secure a license and to submit to state regulation, while at the same time excepting the American Express Company from its provisions.

The Court concluded that the firms were denied equal protection of the laws, saying on page 465:

> "Of course, distinctions in the treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved. This is so even where the discrimination is by name. But distinctions cannot be so justified if the 'discrimination has no reasonable relation to these differences.'"

The basic unfairness of the Ohio Court's decision, and of the Ohio statute, is amply demonstrated by an illustration

which is typical of what happened to Ohio industries because of the discrimination between residents and nonresidents. Two companies engaged in the same business activity, such as retailing or manufacturing, and therefore competing with each other for the same market in the same local area, were treated for purposes of the tax in a substantially different way, not because of any difference in their businesses or in the kinds of property which they held in storage, but merely because the one was a resident and the other was a nonresident. The wares and raw materials of the resident, while in storage, were taxed to the fullest extent permitted by the statute, while those of the nonresident were excepted from any tax whatever. Inequality is the theme of such a system of taxation.

C. The Entire Exception Cannot Be Removed from the Statute.

On page 120 of its decision in *Allied Stores of Ohio, Inc. v. Bowers*, 166 Ohio St., 116, 140 N.E. 2d 411 (1957) (the holding of which controls for this case) the Ohio Court implied that the entire exception for storage only merchandise should be removed from the statute. This dictum is directly opposed to the position taken by the Ohio Court in *B. F. Goodrich Co. v. Peck*, 161 Ohio St., 202, 118 N.E. 2d 525 (1954). There a foreign corporation claimed the exception for its storage merchandise, and the Tax Commissioner opposed the claim with the argument that the exception was discriminatory as to residents, and therefore was unconstitutional. The issue was thus drawn, and if the exception were to be removed, the opportunity was presented by that case. Yet the Ohio Court refused to delete the exception or to modify it in any way. We quote the opinion at page 210:

> "There is much force to the argument of the Tax Commissioner that the decision of the Board of Tax

Appeals (granting the exception) will discriminate against residents of Ohio. However, such an argument should be addressed to the General Assembly and not to this Court. This Court is not responsible for the statutory language or for any ambiguities therein." (Parenthical matter added.)

In the present case, the appellant has not challenged the statutory right of exception from tax which has been granted to nonresident corporations. Their rights are not in issue in this case, and are not before this Court. What appellant does claim is equal protection with non-residents by being considered for tax exception on the same basis.

The Ohio Court denied this request for equal treatment, on the ground that the legislature did not intend to except the storage merchandise of residents, and that the Court could not act contrary to the legislature's expressed intent. In other words, the Ohio legislature intended to discriminate against residents, and therefore the discrimination must be sustained, even though it means a denial of equal protection. To state the proposition is to refute it. No decision of this Court supports the idea that a state legislature can extend a benefit to one part of a class, and then rely upon its intention to discriminate as a justification for denying the same benefit to the remainder of the class. The Federal Constitution requires equal protection within a class, irrespective of a legislative intent to deny that protection.

Since nonresidents are excepted from tax on their property held for storage only, it follows that residents must be treated similarly and accorded equal tax treatment.

The Ohio Court's approach is incorrect for the further reason that this Court has never removed an entire provision from the statute unless it were first shown that the

state legislature considered the provision to be dispensible and would acquiesce in its removal, *Frost v. Corporation Comission of Oklahoma*, 278 U. S., 515 (1929); *Reitz v. Mealey, Commr.*, 314 U.S., 33 (1941).

In 1955, after the decisions in *General Cigar* and *Goodrich, supra*, the storage only exception was reconsidered and amended by the Ohio Legislature. In place of the language,

> "* * * but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only."

the following was substituted,

> "* * * merchandise or agricultural products shipped from outside of this state and held in this state in a warehouse or a place of storage for storage only and for shipment outside this state are not used in business in this state."

The opportunity was then ripe in 1955 for the Ohio Legislature to remove the entire exception for property held in storage. That was not done. The exception was retained, although modified so as to apply to merchandise shipped from outside of Ohio and stored in Ohio for shipment outside the state. The only language which the Legislature did remove was the phrase, "belonging to a nonresident of this state."

It is proved by this action that the Legislature would not concur in the omission of the entire exception and that if any language is to be deleted, it is the discriminatory phrase "belonging to a nonresident of this state." Without that phrase, there would be complete tax equality between residents and nonresidents.

Moreover, the tax exception granted nonresident corporations for merchandise held in storage only is an integral part of former Section 5701.08, Revised Code of Ohio, and therefore cannot stricken from the statute. Section 5701.08

was originally passed by the 1931 session of the Ohio General Assembly. In the very next session, 1933, the whole section was re-enacted with the storage exception as part of it. Thereafter, for some twenty-two years, up until its amendment in 1955, taxpayers relied upon it in making their annual tax returns, and tax officials administered it regularly as a part of the statute.

To remove the whole exception now would subject taxpayers to liability and assessments for taxes dating back to 1933. This naturally would have the effect of a judicial tax levy to the same extent as if the Court were to hold that certain persons should pay a tax which had not been levied on them by the Legislature, and which they were not required to pay under any existing legislative enactment. It is axiomatic that Courts do not sit as superlegislatures empowered to levy taxes on property which the state legislature has not subjected to taxation, *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 565 (1902).

Appellant concludes that the entire exception cannot be removed because it is an integral part of the statute, having been in the statute and administered as a part of it for 22 years; that it cannot be removed for the further reason that when the Ohio Legislature amended the section in 1955, it did not remove the whole exception but only the discriminatory words which had limited it to nonresidents; and the exception cannot be removed for the additional reason that its removal would turn the Court into a taxing body with the result that the Court, not the Legislature, would be levying the tax. If any words can be deleted, they are those contained in the phrase "belonging to a nonresident of this state" because those words create the inequality, and because the Ohio Legislature itself removed them in the 1955 amendment.

D. Section 5701.08, Revised Code of Ohio, is Unconstitutional to the Extent that It Results in the Imposition of a Tax Upon Personal Property Held by Residents for Storage Only.

Former Section 5701.08, Revised Code of Ohio, defined personal property "used in business" as that which is "stored or kept on hand as material, parts, products, or merchandise." To the extent that this definition includes property held by a resident for storage only, it is unconstitutional.

The error in the Ohio Court's reasoning springs from the mistaken belief that in order to implement the equal protection clause, the statutory exception for nonresidents would have to be severed from the body of the statute. This, of course, is not so. The fault of the statute is the unequal tax burden that it casts upon residents. It is the levy and assessment of the tax which the State has asserted against this appellant, and other residents, that creates the inequality, and which should be voided by this Court as unconstitutional. By thus cutting the tax back, and freeing residents of the unequal burden which the tax imposes upon them, the requirements of equal protection are fully satisfied.

Insofar therefore, as Section 5701.08, Revised Code of Ohio, operates to tax all of the appellant's property held in storage, including that held for storage only, the section is unconstitutional and void.

CONCLUSION.

Appellant submits therefore, that the decision of the Court should be reversed as denying resident corporations equal protection of the laws, and final judgment entered for the appellant.

Respectfully submitted,

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APPENDIX I

Section 5709.01—All real property in this state is subject to taxation, except only such as is expressly exempted therefrom. All personal property located and used in business in this state, and all domestic animals kept in this state, whether or not used in business, are subject to taxation, regardless of the residence of the owners thereof. All ships, vessels, and boats, and all shares and interests therein defined in section 5701.03 of the Revised Code as personal property and belonging to persons residing in this state, and aircraft belonging to persons residing in this state and not used in business wholly in another state, other than aircraft licensed in accordance with sections 4561.17 to 4561.21, inclusive, of the Revised Code, are subject to taxation. All property mentioned in this section shall be entered on the general tax list and duplicate of taxable property.

Section 5711.01—As used in sections 5711.01 to 5711.41, inclusive, of the Revised Code:

(A) "Taxable property" includes all the kinds of property, except real property, mentioned in sections 5709.01 and 5709.02 of the Revised Code, and also the amount of value as of the date of conversion of all taxable property converted into bonds or other securities not taxed on or after the first day of November in the year preceding the date of listing, and of all other taxable property converted into deposits after the date as of which deposits are required to be listed in such year, except in the usual course of the taxpayer's business, to the extent he may hold or control such bonds, securities, or deposits on such day, without deduction for indebtedness created in the purchase of such bonds or securities from his credits; but taxable

property does not include such investments and deposits as are taxable at the source as provided in sections 5725.01 to 5725.26, inclusive, of the Revised Code, nor surrender values under policies of insurance. * * *

Section 5711.03—Except as provided in sections 5711.01 to 5711.41, inclusive, of the Revised Code, all taxable property shall be listed as to ownership or control, valuation, and taxing districts as of the beginning of the first day of January, annually, except that deposits not taxed at the source pursuant to section 5725.05 of the Revised Code. The subsequent transfer of any taxable property shall not authorize any taxpayer to omit the same from his return nor the assessor to fail to assess the same in the manner required, although such return or assessment is not made until after such transfer. When a person becomes a taxpayer between the first day of January and the first day of July, in any year, he shall list all his taxable property as to ownership and taxing districts as of the date when he becomes such taxpayer, and as to valuation as of the next preceding first day of January, unless he shows to the assessor, under oath, and by producing a copy of the return or assessment, that the same property has been listed or assessed for taxation in that year in this or another state or country, or that such property has been received by him in exchange for property so assessed; but a person engaging in business between the first day of January and the first day of July in any year shall list the probable average amount of personal property intended to be used in business by him until the first day of January next thereafter.

Section 5701.08—As used in Title LVII of the Revised Code:

(A) Personal property is "used" within the meaning of "used in business" when employed or utilized in connection with ordinary or special operations, when acquired or held as means or instruments for carrying on the business, when kept and maintained as a part of a plant capable of operation, whether actually in operation or not, or when stored or kept on hand as material, parts, products, or merchandise; but merchandise or agricultural products belonging to a nonresident of this state is not used in business in this state if held in a storage warehouse for storage only. Moneys, deposits, investments, accounts receivable, and prepaid items, and other taxable intangibles are "used" when they or the avails thereof are being applied, or are intended to be applied, in the conduct of the business, whether in this state or elsewhere.

(B) "Business" includes all enterprises conducted for gain, profit, or income and extends to personal service occupations.

APPENDIX II

New Jersey Supreme Court.

Mexican Petroleum Corporation, Prosecutor, v. The Borough of Roosevelt, et al., Respondents.

Argued June Term 1919 before Justices Bergen, and Kalisch.

Per Curiam.

The borough of Roosevelt assessed as the property of the prosecutor, a tug and three barges at a valuation of $130,000 and a quantity of oil in storage at $56,409.96. The prosecutor appealed to the Middlesex county board of taxation which affirmed the assessment, and thereupon this

writ was allowed. It is admitted that the tug and barges were improperly assessed, and as to them the assessment should be set aside. The only question in dispute is that relating to the oil. The facts are these. The prosecutor imports the oil from Mexico and then stores it in large retainers which are located in the borough of Roosevelt. After this is done the prosecutor draws the oil and sells it to different persons. The prosecutor's contention is that this oil being an importation, is not liable to taxation, and the only answer to this is that when the oil is pumped from the vessels in which it is imported to these tanks it then becomes mingled with the mass of other property in this state and therefore is under well settled principles, subject to taxation. It is conceded that if this oil was imported in barrels or other packages, it would not be taxable so long as the packages remained unbroken, or disposed of in such packages. We are unable to see how it can be said that the importation has lost its character simply because it is pumped into retaining tanks in this state, for so long as it remains there it is not mingled with the mass of other property. If this be not so, then the character of the retainer would permit the imposition of taxes in violation of the Federal Constitution.

The cases relating to this subject plainly indicate that something must be done by the importer to change the character of the importation before *it* becomes subject to taxation, and the fundamental ground upon which taxation is permitted, is that the property has become part of the mass of other property of the state, and this cannot be said occurs when a boat load of oil in bulk is moved from the ship to the warehouse for the purpose of subsequently selling it. The assessment will be set aside with costs.